RE TAN BOON LIAT @ ALLEN & ANOR. *ET AL.*

TAN BOON LIAT v. MENTERI HAL EHWAL DALAM NEGERI & ORS.

CHUAH HAN MOW v. MENTERI HAL EHWAL DALAM NEGERI & ORS.

SUBRAMANIAM v. MENTERI HAL EHWAL DALAM NEGERI & ORS.

[F.C. (Suffian L.P., Gill C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Ali and Ong Hock Sim F.JJ.) March 18, May 12, 1977]

[Kuala Lumpur — Federal Court Criminal Appeals Nos. 37, 38 and 42 of 1976]

Administrative Law — Habeas Corpus — Preventive Detention — Provision for reference to Advisory Board and for recommendation of Advisory Board to be made within three months — Whether provision mandatory — Failure to comply with provision — Detention becomes unlawful — Confirmation of detention orders by Yang di-Pertuan Agong — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, ss. 4(1) and 6(2) — Federal Constitution, art. 151.

These were appeals from the judgments of the High Court ([1977] 1 M.L.J. 39 and 82). The appellants were subject to orders of detention made under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. They made representations against the orders to the Advisory Board, but the Board did not make recommendations thereon within three months of the detention orders. Nevertheless the Yang di-Pertuan Agong had acting on advice confirmed the detention orders. All the three appellants applied for *habeas corpus*, alleging that their continued detention after a lapse of three months from the date of their detention (within which period Advisory Board had not made their recommendations) was unlawful in the light of the provisions of Article 151(1)(b) of the Federal Constitution and the provisions of section 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance, 1969. The High Court dismissed the applications and the appellants appealed to the Federal Court.

Held, allowing the appeals: (1) reading Article 151(1)(b) of the Federal Constitution and section 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance, 1969, the only reasonable conclusion is that a citizen cannot be detained for more than three months from the order of detention unless (a) the Advisory Board considers the representations of the detainees and makes recommendations thereon to the Yang di-Pertuan Agong within three months from the detention order and (b) the Yang di-Pertuan Agong confirms the order of detention after considering the recommendations;

(2) the failure of the Advisory Board to carry out its duty within the prescribed time in these cases rendered the continued detention after the three month period to be unlawful as it could not be said to be in accordance with law;

(3) although the orders of detention in these cases had been confirmed by the Yang di-Pertuan Agong, that decision was *ultra vires* and could be corrected by the court.

Cases referred to:-

(1) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 1 M.L.J. 129.

(2) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

(3) *Ooi Ah Phua* v. *Officer in Charge, Criminal Investigation, Kedah/Perlis* [1975] 2 M.L.J. 198.

(4) *Musa bin Salleh* v. *Public Prosecutor* [1973] 1 M.L.J. 167.

(5) *The Reverend Thomas Pelham Dale's Case* (1881) 6 Q.B.D. 376, 461, 469 and 470.

(6) *Rex* v. *Halliday* [1917] A.C. 260, 273.

(7) *In re Madhu Limaye* A.I.R. 1969 S.C. 1014, 1019.

(8) *Comptroller-General of Inland Revenue* v. *N.P.* [1973] 1 M.L.J. 165.

(9) *Tinsa Maw Naing* v. *Commissioner of Police, Rangoon & Anor.* [1950] Burma Law Reports 17.

(10) *Government of Malaysia* v. *Arumugam Pillai* [1974] 1 M.L.J. 127.

(11) *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137, 143.

(12) *Padfield* v. *Minister of Agriculture* [1968] A.C. 997.

(13) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155, 165.

(14) *Ex parte Johannes, Choeldi & Ors.* [1960] M.L.J. 184, 186.

(15) *Barker* v. *Palmer* (1881) 8 Q.B.D. 9, 10.

(16) *Dharma Singh* v. *State of Punjab* A.I.R. 1958 S.C. 152.

(17) *Abdul Karim & Ors.* v. *State of West Bengal,* A.I.R. 1969 S.C. 1028.

(18) *N.A. Subramania Iyer* v. *King-Emperor* 28 I.A. 257, 263.

(19) *Monk* v. *Warby* [1953] 1 K.B. 75, 81.

FEDERAL COURT.

Karpal Singh (*K. Kumarendran* and *K. Balasundaram* with him) for the appellants.

Fong Seng Yee, Senior Federal Counsel (*Zaki bin Tun Azmi,* Federal Counsel with him) for the respondents.

Suffian L.P.: These three appeals are against two judgments reported at [1977] 1 M.L.J. 39 and 82 and turn on the construction of Article 151(1)(b) of the Federal Constitution.

I have had the advantage of reading in draft the judgment of the Chief Justice, Borneo, and that of Ong F.J. and with respect I agree that these appeals be allowed and wish to add only a few words.

At the material time Article 151(1)(b) read:

"Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention... no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board... has considered any representation made by him... and made recommendations thereon to the Yang di-Pertuan Agong."

The appellants were all subject to orders of detention made under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969 ("Ordinance 5"), they made representations against the orders to the Advisory Board, but in none of them did the Board make recommendations thereon within three months of the detention orders, and yet thereafter His Majesty, acting on advice confirmed the detention orders.

In my view, it is clear that Article 151(1)(b) envisages two kinds of detention:

(i) detention for a period not exceeding three months; and

(ii) detention for a period exceeding three months.

In my view, it is also equally clear that while a citizen may be detained for a period not exceeding three months without any intervention on the part of the Board, he may not be detained for a period exceeding three months unless within that period the Board has considered his representations and made recommendations thereon to His Majesty. The article does not expressly say that the Board must so act within that period, but I think that the use of the words "has considered" necessarily implies that the intervention of the Board is a prerequisite.

It is true that in *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[1] with reference to Article 5(1) which reads: —

"No person shall be deprived of his ... personal liberty save in accordance with law"

I drew a distinction between law and procedure and said in effect that the courts will take a serious view of failure to comply with substantive law but not of failure to comply with procedural law. But here the provision breached is not just procedural, but in my opinion substantive. In *Karam Singh* after the order of detention had been made against him, the Minister was required to do certain things, which Mr. Karam Singh complained the Minister had not done. Here, on the other hand, the condition for the detention of the appellants after the period of three months is fundamental; that condition had to be satisfied *before* the order could be made; it was a condition *precedent*. Before the appellants could be further detained beyond three months the Board must have made recommendations on their representations. That condition precedent has not been satisfied and in my judgment their continued detention after that period was therefore unlawful, since it was not, in the words of Article 5(1), "in accordance with law".

During the course of arguments, we debated the case of a detainee submitting his representations late and within a few days of the Board meeting to consider them a member suddenly fell ill and the meeting had to be postponed, and therefore the Board was unable to make recommendations within the period of three months. It was submitted by Mr. Fong that in that event it could have been quite lawful to continue the detention beyond that period and that similarly the orders of detention here are also lawful. But here there is no evidence of anything like that happening and the case debated was only hypothetical, and I think that we should not pass an opinion on it, leaving the question open, and simply decide these appeals on the facts as they are.

As the continued detention after three months was illegal, should this court then order the release of the appellants? Mr. Fong submitted not, because, (1) it is not disputed that since the commencement of these three cases the Board had made recommendations and after considering them His Majesty made his decision thereon, whereupon the orders of detention against the appellants were confirmed, though it is true that all these things happened more than three months after the dates of the original orders of detention, and (2) because under section 6(2) of Ordinance 5 the decision of the Yang Dipertuan Agung is "final, and shall not be called in question in any Court." I am of the opinion however that that section applies only to real decisions, not to *ultra vires* decisions, of His Majesty (see *Anisminic Ltd.* v. *Foreign Compensation Commission*[2]) and here clearly His Majesty's decision was *ultra vires*, and therefore the court is free to order the release of the appellants.

I would accordingly so order.

Lee Hun Hoe C.J. (Borneo) (read by Ong Hock Sim F.J.): These three appeals against the dismissal by the High Court of three applications for *habeas corpus* are, for convenience, dealt with together as they raise similar issues involving the construction of the emergency legislation and the Federal Constitution. The important question is whether the continued detention of detenu after a lapse of three months from the date of the detention order is lawful in the light of the provisions of Article 151(1)(b) of the Federal Constitution and the mandatory provisions of section 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance, 1969 (herein called the Ordinance).

All three appellants were detained for a period of two years under detention orders made by the Menteri Hal Ehwal Dalam Negeri, Malaysia, pursuant to section 4(1) of the Ordinance. They made representations to the Advisory Board within two weeks of their detention. In respect of the first two appellants the Advisory Board heard them and considered their representations within three months from the date of the detention orders. But, it only made its recommendations to the Yang Dipertuan Agung after the expiry of the three month period. In the case of the third appellant the Advisory Board considered the representations and made recommendations thereon to the Yang Dipertuan Agung after the expiry of the three month period. In each case the detention order had at the time of hearing of these appeals been confirmed by the Yang Dipertuan Agung.

Section 6 of the Ordinance reads as follows: —

"6(1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.

(2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any Court."

Article 151(1)(b) of the Constitution provides that: —

"151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong."

Paragraph (b) above has been amended by Act A. 354/76 effective from August 27, 1976 and reads as follows: —

"(b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang diPertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow."

In this judgment the pre-amended provision will be referred to unless otherwise stated. The amended provision is clearly to ratify the three cases though it does not have retrospective effect.

Under section 3 of the Ordinance a police officer may arrest a person without warrant and detain him

for a period not exceeding 60 days without an order of detention being made by the Minister. Under section 4(1) the Minister may at any time make an order detaining a detenu for a period not exceeding two years. Under section 4(1A) he may at any time revoke the detention order. Under section 5 the order must be served on the detenu soon after it has been made. At the time of service of the order the detenu shall be informed of his rights to make representations against the order to the Advisory Board and be furnished with a statement in writing of the grounds on which the order was made and also of the allegations of fact on which the order was based. Section 6(1) says the Advisory Board, shall, within three months from the date of the detention order, do two things, namely, (a) consider the representations and (b) make recommendations thereon to the Yang Dipertuan Agung. It is not in dispute that in the first two cases the recommendations were made outside the three month period and in the third case both the inquiry and recommendations were outside the three month period.

Despite his finding on the facts that there was violation of the provisions of section 6(1) of the Ordinance and Article 151(1)(b) of the Constitution, that is, the procedural requirements had not been strictly complied with, Arulanandom J. who heard the first two cases, held that the detention was valid in view of *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[1] and *Ooi Ah Phua* v. *Officer-in-Charge, Criminal Investigation, Kedah/Perlis.*[3] He expressed his views as follows: —

"There is no denying that in the two cases before me the procedural requirements have not been complied with, and, if the matter were to end there, I would not have the slightest hesitation in ordering the applicants to be set at liberty but the decisions of our courts in considering matters of this nature constrain me to consider the question of the detention becoming illegal through acts not being performed within the time-limit prescribed by both section 6 of the Emergency (Public Order and Prevention of Crimes) Ordinance, 1969 and Article 151(1)(b) of the Constitution in the light of our decided cases."

In holding that the detention was valid Abdul Hamid J. also relied on *Karam Singh's case*[1] to support the view that the defect in the detention order is one of form only and not of substance and, therefore, it does not make unlawful a lawful order of detention. But, here we are not dealing with the defect of any detention order. This point has not been raised. We are concerned with the statutory duty of the Advisory Board. Abdul Hamid J.'s approach to the problem is interesting. He says Article 5(1) should be read with Article 149 which declares that "if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation" then Government is entitled to do any of the matters provided in paragraphs (a) to (e) to ensure that "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9 or 10...." In dismissing the application he stated that: —

"It is probably open to a detenu to say that by right the Advisory Board should hear his representations and make recommendations thereon within three months but it seems obvious to me that such right cannot be held to be a real and substantive right of a citizen guaranteed by the Constitution an infringement of which may justify the court to award a Writ of *Habeas Corpus*. It cannot for a moment be doubted that there has been a failure to comply with the statutory direction but I am not prepared to hold that it is open to this court to go behind such failure to inquire the causes of it. In the final analysis it is my finding that mere non-compliance with the directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not I think render unlawful a detention lawfully made."

There can be no doubt that Abdul Hamid J. was fully aware of the possible conflict or inconsistency between the Ordinance and the Constitution when he rejected the contention that Article 151(1)(b) read with section 6(1) of the Ordinance should be construed to mean that the Advisory Board must consider the representations and make recommendations thereon to the Yang Dipertuan Agung within three months from the date of the detention order. This would mean that the special requirement under section 6(1) has created for the detenu a right which is guaranteed by the Constitution. In rejecting the contention he said:—

"Such a construction is not in my considered judgment tenable and reconcilable in the absence of similar provision under Article 151(1)(b). The special requirement is, to state the obvious, only to be found in the ordinance promulgated by the Yang di-Pertuan Agong under Article 150(2) of the Constitution. It is not my intention to decide whether or not section 6(1) should prevail over the impugned Article but obviously it cannot seriously be suggested that it is the objective of the said Ordinance to pronounce therein the fundamental right and liberty of a subject."

It is the submission of appellants that Article 151(1)(b) confers on a detenu under the Ordinance, or for that matter under any other law, an absolute right to apply for an inquiry by the Advisory Board. Rule 6 of the Public Order and Prevention of Crimes (Procedure) Rules, 1972 lays down his right to be heard at the inquiry and to be represented by an advocate. Further, he has the right to expect the Advisory Board to make recommendations to the Yang Dipertuan Agung after considering his representations. The constitutional rights are also covered by section 6(1) of the Ordinance. In other words, the Advisory Board must do the two things within the three month period otherwise the continued detention would be unlawful. The confirmation by the Yang Dipertuan Agung can be outside the three month period at the discretion of His Majesty.

Article 151(1)(b) refers to citizens. The three appellants are citizens and entitled to its protection. The duty of the court is to protect the liberty of the individual. However distasteful and undesirable the character of the detenu may be, it is still the duty of the court to construe the law according to accepted principles of interpretation. Thus, in *Musa bin Salleh* v. *Public Prosecutor*[4] this court, in holding an order valid, made clear that any doubt about the validity of a detention or restriction order should be resolved in favour of the accused. In *The Reverend Thomas Pelham Dale's Case*[5] Brett L.J. observed at page 461 that: —

"Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

Cotton L.J. in supporting this stated at page 469: —

"I quite agree with Brett L.J., that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance."

"Preventive justice", said Lord Atkinson in *Rex* v. *Halliday,*[6] "as it is styled, which consists in restraining a man from committing a crime he may commit but has not yet committed, or doing some act injurious to members of the community which he may do but has not yet done, is no new thing in the laws of England."

The petitioner complained that he and others were arrested but were not informed of the reasons or grounds for the arrest in the case of *In re Madhu Limaye.*[7] Grover J. in his judgment commented: —

"As stated in *Ram Narayan Singh* v. *State of Delhi* A.I.R. 1953 S.C. 277 this court has often reiterated that those who feel called upon to deprive other persons of liberty in the discharge of what they conceive to be their duty must, strictly and scrupulously, observe the forms and rules of law. Whenever that is not done the petitioner would be entitled to a writ of *Habeas Corpus* directing his release."

He continued and added that: —

"Once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand the Magistrate directed detention in jail custody after applying his mind to all relevant matters. This the State has failed to do."

Encik Karpal Singh for appellants did not object to the admission of additional affidavits prior to the hearing of these appeals as he felt that the confirmation by the Yang Dipertuan Agung would not change anything once he could establish the illegality of the continued detention.

Article 21 of the Indian Constitution provides that no person shall be deprived of his personal liberty *except according to procedure established by law.* Our Article 5(1) is word for word the same but for the words underlined it says "save in accordance with law." One thing common to both countries is that this constitutional right is not absolute. The expression "save in accordance with law" does not necessarily mean "without due process of law" as is understood in India by virtue of the words used in its Constitution. Encik Karpal Singh submits that our expression is wider and that "law" includes procedure. Section 2 of the Interpretation Act, 1967 says that the word "law" has the meaning assigned by Article 160(2) of the Constitution. "Written law" is defined to include (a) the Federal Constitution and the Constitution of any State; (b) Acts of Parliament and subsidiary legislation made thereunder and (c) Ordinance and enactment and subsidiary legislation made thereunder Article 160(2) defines "law" to include "written law, the common law insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof." In these appeals the question of executive policy does not arise for consideration. Here it is a matter of construction of the provisions of the law.

In this connection it is interesting to note that in *Comptroller-General of Inland Revenue* v. *N.P.*[8] the court rejected the argument that the provisions of section 82 of the Income Tax Ordinance, 1947 were void as being inconsistent with Article 13(1) of the Federal Constitution on the ground that the legislation was duly passed by Parliament and was, therefore, in accordance with law. In his judgment Chang Min Tat J. said: —

"In the construction of what 'law' in this context means, it therefore appears reasonably clear that it means enacted law and that there can be no resort to natural justice. The Supreme Court of Burma has in a decision *Tinsa Maw Naing* v. *The Commissioner of Police Rangoon & Anor.*[9] for which I was greatly indebted to Mr. Sivalingam for the tax-payer who drew my attention to it and supplied me with a xeroxed copy, though it was most damaging to his case, construed the meaning of the phrase 'save in accordance with law' in Article 16 of the then Burmese Constitution which read — 'No citizen shall be deprived of his personal liberty . . . save in accordance with law' and held that 'when the Constitution speaks of 'law' it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.'"

In the latter case of *Government of Malaysia* v. *Arumugam Pillai*[10] the defendant objected to an application for summary judgment in respect of a large sum due to the Government of income tax. Chang Min Tat J., after referring to Article 13(1) of the Constitution which says that no person shall be deprived of property save in accordance with law, stated:—

"I had however in a previous judgment followed the decision of the Supreme Court of Burma in *Tinsa Maw Naing* v. *The Commissioner of Police Rangoon & Anor.* on the construction of 'in accordance with law' and held that 'when the Constitution speaks of law, it speaks of the will of the Legislature enacted in due form, provided that such enactment is within the competence of the Legislature.' In my view then and now, there can be no doubt that income tax is deprivation of property in accordance with law, or that the Income Tax Act 1967 was duly enacted. Taxing cannot therefore be said to be inconsistent with the Constitution."

The facts in these appeals can easily be distinguished from *Karam Singh's case*[1] and *Lee Mau Seng* v. *Minister of Home Affairs, Singapore & Anor.*[11] The appellant in *Karam Singh's case*[1] was detained for a period of two years under a detention order made by the Minister of Home Affairs under the Internal Security Act, 1960. Having been unsuccessful before the Advisory Board he applied to the court for a writ of *habeas corpus* alleging, *inter alia,* that the detention order was illegal and made *mala fide.* One of the grounds was that the detention was unlawful being contrary to Article 5(2) of the Constitution which provides that "Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him." Suffian F.J., as he then was, in dismissing the appeal concluded his judgment in these words: —

"Here the power of detention is entrusted to the highest authority in the land acting on the advice of Ministers responsible to and accountable in Parliament. In India it is entrusted to comparatively minor officials. Strict compliance with procedure is therefore necessary. It is also necessary for another reason. Article 21 of the Indian Constitution provides that no person shall be deprived of his personal liberty except according to procedure established by law. In

contrast, clause (1) of our article 5 provides simply that no person shall be deprived of his personal liberty save in accordance with law — without any mention of procedure."

In *Karam Singh's case*[1] the order of detention under which appellant was detained mentioned three grounds in the alternative but the grounds served on him mentioned only one ground for his detention, namely, that he had acted in a manner prejudicial to the security of Malaysia. His contention that his detention was unlawful was dismissed by the High Court. This Court, comprising five judges, also dismissed his appeal holding that his detention was lawful and that the defect, if any, in the detention order in setting out the objects and purposes of detention was a defect in form only and not of substance. The Government is under no obligation to inform a detenu of all grounds for his detention. Article 151(3) of the Constitution states quite clearly that the authority does not have to disclose facts which in its opinion are against national interest. This no doubt places a detenu in a disadvantageous position for he could not make representations on facts not disclosed.

The appellant in *Lee Mau Seng's case*[11] was detained for a period of two years under the Internal Security Act. From the date of his arrest on May 2, 1971 until after the order of detention was made on May 22, 1971 he was denied access to his solicitors in spite of a request by his solicitors for access to enable them to get instructions and to advise him regarding his arrest and detention by police. Wee Chong Jin C.J. (Singapore) followed *Karam Singh's case.*[1]

None of the appellants complains about the initial order but says that the continued detention after the three month period is illegal. In both *Karam Singh's case*[1] and *Lee Mau Seng's case*[11] the orders of detention were challenged. No complaint was made in either case against the Advisory Board in the performance of its duty. In India under Article 22(7) of the Indian Constitution it is possible for a person to be detained without trial for a period exceeding three months without obtaining the opinion of the Advisory Board. Neither in this country nor in Singapore is there a similar provision. Datuk David Marshall who appeared as counsel in *Karam Singh's case*[1] also appeared in *Lee Mau Seng's case.*[11] In the latter case he also raised the point that the order of detention was bad because it ordered the appellant's detention for two years and was, therefore, *ultra vires* Article 151(1)(b) of our Constitution as applicable to Singapore. His contention was that Article 151(1)(b) expressly provides that no citizen shall be detained under a law which provides for preventive detention for a period exceeding three months unless the Advisory Board has considered the appellant's representations and made recommendations within the prescribed time. Wee Chong Jin C.J. (Singapore) rejected the contention by saying that: —

"The short answer to this argument is that article 151 does not prohibit an order of detention from specifying that the citizen therein named is to be detained for a period exceeding three months. Article 151(1)(b) makes the continued detention of the named citizen after three months unlawful unless its requirements have been complied with."

It is important to note that the judgment in that case was delivered on July 13, 1971 and the date of detention was May 22, 1971. In other words, the three month period from the date of the detention order had not expired at the time of the delivery of judgment. It would thus be premature to question the duty of the Advisory Board in that case.

In *Karam Singh's case*[1] this court did not decide that if the Advisory Board did not do the two things within the three month period it was a matter of procedure. Article 151 was raised by Ali Hassan F.J. who made these observations at page 158: —

"Both in respect of grounds of detention and in respect of allegations of fact, it could have been argued that in the circumstances of this case there has been a breach of constitutional requirements set out in article 151(1)(a). If these have been argued, consideration will have to be given as to whether the continued detention of the appellant for a period exceeding three months was lawful in terms of article 151(1)(b) which provides —

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong.

It may be observed that at the time when the appellant commenced proceedings before the High Court, he has been detained for about nine months and the question of his being detained for a period exceeding three months could, therefore, be a proper question to consider.

Unfortunately, no one has thought fit to argue the point as throughout these proceedings the argument was confined mainly to the question whether the order of detention was valid. In the absence of the argument which I have mentioned, it is not possible to say whether the continued detention of the appellant was lawful or otherwise."

So the question which has been left open has now to be decided. The contention of appellant is that the provisions of section 6(1) of the Ordinance and Article 151(1)(b) of the Constitution are mandatory and not directory in view of the subject matter. In such matter the interpretation should be decided in favour of a subject when there is any doubt.

Abdul Hamid J. did not doubt that there was failure on the part of the Advisory Board to comply with what he described as "statutory direction". He was of the view that the court should not go behind to find out the reasons for such failure. I think the reasons are important, indeed crucial. If the court knows the reasons it may have to decide on the question of reasonableness as in *Ooi Ah Phua's case.*[3] It is well settled law that the courts can even question the exercise of power by a minister when acting under powers given by legislation. See *Padfield* v. *Minister of Agriculture.*[12]

The submissions on behalf of the respondents are three-pronged. First, that the two requirements under Article 151(1)(b) for the representations to be considered by the Advisory Board and for recommendations to be made to the Yang Dipertuan Agung need not be complied with within three months of the order of detention. This envisages that Article 151(1)(b) is open to two interpretations. One is that the Advisory Board must do its duty within three months. The other is that it can do its duty outside the three months so long as it does the two things. In support of the latter contention comparison is made of our Article 151(1)(b) and the Indian Article 22(4). Our Article

151(1)(b) has already been set out. The relevant provisions of Article 22(4) of the Indian Constitution provides: —

"(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless —

(a) an Advisory Board . . . has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention."

The Indian provisions indicate clearly the Advisory Board must make its report before the expiry of three months. Our provisions are silent on that, thus opening to the interpretation that the Advisory Board can do the two things outside the three months. It is also said that there may be circumstances which might prevent the Advisory Board from doing the two things within three months. For example, a detainee only makes his representations a few days before the three month period. Again, for instance, the Chairman of the Advisory Board or a member of the Board is indisposed. These are of course, speculations. There is no evidence in support.

Secondly, that if this court is of the view that the Advisory Board could not do the two things within the three months then it is submitted that the doing of the two things is merely a formal and procedural defect and does not invalidate the order of detention. In support of this contention respondent cited passages from judgments of Suffian F.J. in *Karam Singh's case*[1] and Wee Chong Jin C.J. (Singapore) in *Lee Mau Seng's case*[11] to show the difference between Indian provisions and our provisions which are also applicable to Singapore. In other words, no reliance should be placed on Indian authorities which are not binding but merely persuasive. As the matter involves a question of interpretation comparison is inevitable.

The Ordinance was made under Article 150(2) to secure public order, suppress violence and prevent crimes involving violence. It is said that in interpreting the law relating to preventive detention the manner of approach is important. In *Karam Singh's case*[1] Ong Hock Thye C.J. (Malaya) made these observations at page 141: —

"By Article 151 detailed and precise restrictions are laid down on preventive detention which have been scrupulously observed in the provisions of the Internal Security Act.

Under article 149 any provision in the Internal Security Act designed against action prejudicial to national security is declared 'valid notwithstanding that it is inconsistent with any of the provisions of article 5, 9 or 10', namely, the fundamental liberties. This, of course, means sanction of encroachments on the rule of law, justified in the national interest. Under the circumstances I think it must be frankly acknowledged that a perfect decision is in most cases an unattainable ideal. Once this fact is appreciated it seems to me that the issues raised in this appeal require a realistic approach rather than as an exercise of semantics. My decision in this appeal is based accordingly."

In the same way that Articles 5, 9 and 10 have to give way to a legislation enacted under Article 149, Article 150(6) requires any other provision in our Constitution to give way to an Ordinance promulgated under Article 150. It is important to note that while Article 149 is paramount over Articles 5, 9 and 10, Article 150 is paramount over all provisions in our Constitution. Since the Ordinance was made under Article 150(2) it prevails over the Constitution. This is important on the assumption that no time limit has been laid down by Article 151(1)(b) for the Advisory Board to do the two things. Although the amended provision of Article 151(1)(b) has changed this it does not affect these appeals in any way. But, section 6(1) of the Ordinance says quite clearly that the Advisory Board must do the two things within three months from the date of the order of detention. On that assumption there is thus a conflict or inconsistency between Article 151(1)(b) of the Constitution and section 6(1) of the Ordinance in respect of the time limit. The Ordinance being a special one in the sense that it was made under Article 150 must prevail over the Constitution. This must be so since under Article 150(6) any inconsistency between the Ordinance and the Constitution does not render the Ordinance invalid. In other words, there is an exception to the supremacy of the Constitution. Thus, if there is any inconsistency between the Ordinance made under Article 150 and the Constitution the Ordinance prevails. See also *The Government of Malaysia* v. *Mahan Singh.*[13]

Thirdly, the submission is that even if this court takes the view that the Advisory Board must do the two things within three months or rule that the defect is a breach of a substantive right, this court cannot declare the detention to be void because the Yang Dipertuan Agung has already confirmed the detention orders of the Minister. *Ooi Ah Phua's case*[3] was cited in support. In that case the appellant was not brought before the magistrate within twenty-four hours but on the first working day because of the weekly holidays in Kedah. There was no unreasonable delay in the circumstances. In the present case there is not a shred of evidence to enable the court to consider the question of reasonableness. The court cannot exercise its discretion merely on speculative evidence. It would be improper to do so.

In *Mahan Singh's case*[13] I said that all acts done by His Majesty and by the Director of Operations in an emergency were dictated by necessity and so long as they were done in good faith the courts would not question them for the simple reason that in an emergency State necessity and interest were of paramount importance over individual rights. But, in this case we are not dealing with acts done by His Majesty. The Advisory Board does not enjoy such privilege. It has been set up to do its duty within a prescribed period. It has failed to do so thereby making the continued detention of doubtful validity. I also said that "it is part of the democratic process, even during national emergency, for the court to be vigilant that emergency expedients do not exceed the real necessities of the situation." Further, preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors.*[14] Rigby J. said to the effect that where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which

deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith. The executive may decide to arrest him on his release and the process starts all over again. The court is not concerned with such matters at this stage. The function of the court is to interpret the law in accordance with established principles of construction.

The word "procedure" in Article 21 of the Indian Constitution has been interpreted to require strict compliance with procedural requirements which is not required by our Article 5. The Indian Courts have indeed relied on Article 21 to see that the executive states clearly which of the grounds for detention specified in the statute are in fact applicable to a particular detenu. The requirement to provide sufficient particulars is to enable a detenu to properly present his case. The requirement is derived from the statute and is not a procedure laid down by Article 21. Our Article 151 and various sections of the Ordinance prescribe limitations on the right given by Article 5. If the provisions of Article 151 and the various sections of the Ordinance are complied with then the arrest and detention will be lawful even though they infringe personal liberty because the arrest and detention will be in accordance with law. For myself I find it difficult to see how our Article 5 could be interpreted to exclude the question of procedure even though there is no mention of procedure. The exclusion of procedure is merely an inference drawn from the remarks of Suffian F.J. in *Karam Singh's case.*[1] He was merely pointing out the difference in the wordings of the Indian Constitution and our Constitution. He did not say that procedure was not part of the law. I am inclined to agree with Encik Karpal Singh's contention that the expression "in accordance with law" in Article 5 of our Constitution is wide enough to cover procedure as well. Here the point is not whether the question of procedure is more important under one Constitution than under the other. If the expression "in accordance with law" were to be construed as to exclude procedure then it would make nonsense of Article 5.

In my view reading Article 151(1)(b) of the Constitution and section 6(1) of the Ordinance together the only reasonable conclusion is that a citizen cannot be detained for more than three months from the date of the order of detention unless the Advisory Board perform its duty within the three month period. There is no question that the minister may make a detention order for a period of two years. But, any detention after the three month period is subject to two conditions, namely, (1) that the Advisory Board considers the representations of the detenu and make recommendations thereon to the Yang Dipertuan Agung within three months from the date of the detention order, and, (2) that the Yang Dipertuan Agung confirms the order of detention after considering the recommendations. Whatever decision the Yang Dipertuan Agung should make it would be final and could not be challenged in any court. On the facts both Arulanandom J. and Abdul Hamid J. agreed that the Advisory Board had not performed its duty within the prescribed time. The former was clear that "the procedural requirements had not been complied with." The latter considered that the failure was merely that of a "statutory direction" and that the court could not inquire into the causes of such failure. In other words, the first condition has not been satisfied.

Section 6(1) of the Ordinance is couched in mandatory terms. It gives the Advisory Board no discretion. We must not write into the section what has not been written by the Legislature under the thin guise of interpretation. The Constitution must not be rendered illusory and meaningless by strained interpretation. *Maxwell* on Interpretation of Statutes, 11th Edition, page 375, states: —

> "Where, however, the act or thing required by the statute is a condition precedent, compliance cannot be dispensed with, and if it is impossible the jurisdiction fails. It would not be competent to a court to dispense with what the legislature had made the indispensable foundation of its jurisdiction."

As early as 1881 in *Barker* v. *Palmer*[15] relating to the failure to comply with rule 7 of Order VIII of the County Court Rules, 1875, Grove J. held that compliance was obligatory and not merely directory. He said: —

> "In construing Acts of Parliament, provisions which appear on the face of them obligatory, cannot, without strong reasons given, be held only directory. The rule is, that provisions with respect to time are always obligatory unless a power of extending the time is given to the court, and there is no such power here."

Section 6(1) is clear as to time. A positive duty is cast upon the Advisory Board to do the two things within a period of three months from the date of the detention order. When a citizen is detained the law does not take away all his rights. He is entitled to be informed of the grounds of his detention, make representations, appear at the inquiry, brief advocate and expect recommendations to be made within the prescribed period. These are rights which he shares with all fellow detenus. These rights are correlated with the statutory duty owed to them as citizens in whose interest the statutory function has to be performed by the Advisory Board. This is a case where the Advisory Board has failed to perform its obligations within the period laid down by law. In other words, the Advisory Board has not acted in accordance with law. In such matter as fundamental as the liberty of the subject, it is of utmost importance that there should be strict compliance with the requirement of the Constitution and any law resulting in the deprivation of personal liberty. Breach of such duty would not only affect the liberty but also render the continued detention after the three month period unlawful. It is breach of such duty that is the basis of the complaint in all three cases. In my judgment the failure of the Advisory Board to carry out its duty within the prescribed time renders the continued detention after the three month period to be unlawful as it cannot be said to be in accordance with law.

I would allow the appeal in all three cases.

Ong Hock Sim F.J.: These three appeals were, by consent, heard together. The court agreed with counsel for the appellants that the only issue in all three was the legality of the detention of the appellants after three months from the date of the order of detention, having regard to Article 151(1)(b) of the Federal Constitution (hereinafter referred to as "the Constitu-

tion") and section 6(1) and (2) of the Emergency (Public Order and Prevention of Crime) Ordinance, No. 5 of 1969 (hereinafter referred to as "the Ordinance").

The undisputed facts are: —

(a) In respect of appellant Tan Boon Liat @ Allen in Appeal No. 37: —
  (i) Order of detention was made on January 26, 1976.
  (ii) In accordance with rule 3(3) of the Public Order and Prevention of Crime (Procedure) Rules, 1972 (P.U. (A) 246), the appellant made representations to the Advisory Board constituted under Article 151(2) of the Constitution.
  (iii) An enquiry was held on March 19, 1976.
  (iv) Recommendations of the Board were made on May 11, 1976.
  (v) Following thereon, the order of detention was confirmed by the Yang Dipertuan Agung by letter dated August 26, 1976.

(b) In respect of appellant Chuah Han Mow @ Han Mau @ Sunny Chua in Appeal No. 38: —
  (i) Order of detention was dated September 11, 1975.
  (ii) Appellant complied with rule 3(3) in regard to representations against his detention.
  (iii) An enquiry was held on February 19 and 21, 1976.
  (iv) Recommendations were made on March 2, 1976.
  (v) Order of detention was confirmed on July 22, 1976.

(c) In respect of appellant Subramaniam s/o Muthiah @ Muthiya in Appeal No. 42: —
  (i) Order of detention was dated March 5, 1976.
  (ii) Representations were made on March 15, 1976.
  (iii) An enquiry was held on October 16 and 20, 1976.
  (iv) Recommendations were made on November 11, 1976.
  (v) Confirmation of detention order was dated January 4, 1977.

Article 151(1)(b) of the Constitution reads: —

"151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(b) no citizen shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has *considered* any representations made by him under paragraph (a) *and made recommendations* thereon to the Yang di-Pertuan Agong." (Emphasis is mine).

Section 6(1) of the Ordinance enacts: —

"6. (1) Whenever any person has made any representations under section 5(1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong."

Whether the said article and the said section above quoted lay down the law or the procedure to be observed, the appellants have been subjected to restraint, in derogation of their fundamental right not to be deprived of their personal liberty save in accordance with law (*vide* Article 5 of the Constitution). In either case, the provisions are clearly mandatory. The *law* as such was violated. If those provisions are viewed otherwise and held to be *merely procedural* in character (as the learned trial judge did), even so, mandatory rules of procedure were plainly ignored. Both aspects were admittedly recognised by the learned judge who said so in words that allowed no misconstruction. "On the facts," he said, "it cannot be disputed that there has been *violation* of the provisions of the *law* relied on by counsel." Later, he added, "there is no denying that in the two cases before me the procedural requirements have not been complied with, and, if the matter were to end there, I would not have the slightest hesitation in ordering the applicants be set at liberty." He was referred to two Indian cases : (1) *Dharma Singh* v. *The State of Punjab*[16] and (2) *Abdul Karim & Ors.* v. *State of West Bengal.*[17]

There is also the case of *In re Madhu Limaye*[7] cited to us by counsel. I need only quote the headnote: —

"Compliance with Article 22 is mandatory. Person detained in violation of Article 22(1) would be entitled to writ of Habeas Corpus directing his release."

However, he felt constrained by "the decisions of our courts in considering matters of this nature" whether "detention becoming illegal through acts not being performed within the time limit prescribed" under the said Article and Ordinance were not defects or irregularities curable and cured by subsequent validation of the detention order whereby detention *at the time of application to court* had been formally legalised. For authority, he cited *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[1] and *Ooi Ah Phua* v. *Officer-in-Charge, Criminal Investigations, Kedah/Perlis.*[3] Before I deal with them, I would quote the concluding paragraphs of the judgment summarising the grounds of decision: —

"Hence on the principles inspiring the judgment one can distil what the substantive rights of a person detained under sections 4, 5 and 6 of the Emergency Ordinance are. They are:—

(1) To be informed of the grounds of his detention;
(2) Subject to Clause (3) of Article 151 of the Constitution (which provides that no authority may be required to disclose facts whose disclosure would in its opinion be against the national interest) to be informed of the allegations of fact on which the order is based;
(3) To be served with a copy of the detention order as soon as may be after the making of the order;
(4) To be informed of his right to make representations to an Advisory Board;
(5) To be furnished with a statement in writing —
  (i) of the grounds on which the order is made;
  (ii) of the allegations of fact on which the order is based.
(6) To make representations to an Advisory Board;
(7) To have his representations heard and considered by the Advisory Board;
(8) To have the Advisory Board make recommendations to the Yang di-Pertuan Agong.

If these rights have been accorded to the detenu and subsequent to this on the directions of the Yang di-Pertuan Agong

the detention order is confirmed and ratified then the detention of the detenu is legal and no mischief has been done to the section 6 of the Emergency Ordinance 5 of 1969 or Article 151 of the Constitution.

For the courts, just because the Advisory Board through want of time or other eventualities was unable to hold its inquiry or make its recommendations within the prescribed period of three months or just because the manner or form in which other technical requisites were complied with were not in the prescribed forms to hold that the personal liberty of a person lawfully detained has been invaded with such violence as to entitle him to be set free when the detenu by his involvement in international drug trafficking has sentenced to imprisonment for life the minds and bodies of young men and women throughout the world by enslaving them to drugs would be to reduce the courts to forums for theatrical farce and judges to the level of arbiters imperceptive to the urgency for the administration of justice to develop with a changing society."

With all respect, it appears to me that there has been a misreading of the above two cases. In *Karam Singh* (cit) only the present Lord President (then Federal Judge), as one of the five judges, referred to certain Indian cases which stressed the provisions to be followed in preventive detention cases as laying down matters substantially procedural in nature. I should point out that this point was not referred to or considered by any of the other four judges; it was not the *ratio decidendi* of the judgment of Suffian F.J. (as he then was) — far from it. The *ratio decidendi* common to all five judgments was that there were no merits whatsoever in that appeal. Moreover, there are two other points to be noted — first, that Suffian F.J. (as he then was) did not in terms, or on the facts, expressly or impliedly say that, where a time limit was definitely laid down (without any proviso for extension under any circumstances), such time limit can be disregarded for any reason however cogent. Secondly, there are mandatory rules, even of procedure, which cannot be passed over lightly as irregularities, because they are incurably illegal as being in contravention of strictly imperative provisions: see *N.A. Subramania Iyer* v. *King-Emperor.*[18]

The other case of *Ooi Ah Phua* (cit), if I may point out with respect, had nothing whatsoever to do with procedural irregularities being innocuous and of no effect where rules of procedure had been breached or ignored. I regret being unable to see in what way the decision in this case justified the judge in taking the view that violation of section 6 of the Ordinance and Article 151(1)(b) of the Constitution, were within his powers to condone.

The citation of *Karam Singh* and *Ooi Ah Phua* as authorities reminds me of what Greer L.J. said in *Monk* v. *Warby*: —[19]

"... I desire to say first that it is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case."

As for the third appeal, Abdul Hamid J. referred to Article 149 which declares that "If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation" to do any of the matters provided in paragraphs (a) to (e) "any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10...."

I find no such recital in the Ordinance, which permits preventive detention in contravention of Article 5. Apart from this, Abdul Hamid J. erred in saying Article 151 was impugned. Far from it, reliance is placed on it, as well as on section 6.

In the light of what I have said in regard to the other two appeals, I do not agree that this is a case of mere non-compliance with a statutory direction.

Learned Federal Counsel submitted that even if this court ruled that there had been breach of a substantive right, this court would still be unable to intervene as the order has subsequently been confirmed by the highest authority in the land having regard to section 6(2) which reads: —

"6. (2) Upon considering the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan Agong thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any court."

Where there has been a misconception as to the power to confirm under section 6(2), it is clearly incumbent on this court to rectify the error. (See *Anisminic* v. *Foreign Compensation Commission*[2] at page 208B, *per* Lord Wilberforce).

I have read the judgments of the Lord President and the Chief Justice, Borneo and respectfully agree with them that these three appeals be allowed. I would add that the Chief Justice, Malaya and my brother Ali F.J. concur.

The order of the court, therefore, is that these appeals be allowed and the appellants be set at liberty.

Appeals allowed.

Solicitors: *Kumar, Chan & Chia.*

HASHIM BIN SAUD v. YAHAYA BIN HASHIM & ANOR.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) May 25, 1977]

[Alor Star — Federal Court Civil Appeal No. 131 of 1975]

Administrative Law — Right of arrested person to counsel — When right begins — Whether right exists when accused detained for investigation — Criminal Procedure Code, (F.M.S. Cap. 6), s. 117 — Federal Constitution, art 5(3).

Constitutional Law — Right to counsel — Person under detention — Federal Constitution, art. 5(3).

This was an appeal from the decision of Harun J. ([1977] 1 M.L.J. 259). The appellant had been arrested on suspicion of being involved in the theft of an electric generator. After being questioned by the 1st respondent he was produced before a magistrate and subsequently ordered to be detained under section 117 of the Criminal Procedure Code. An application was made for a lawyer to visit the appellant but this was not immediately granted and the lawyer was informed that he could see the appellant on a subsequent date when the investigations were expected to be completed. An application was then made for the release of the appellant it being argued that the refusal to allow the appellant to consult his counsel during the period of police detention was a breach of his constitutional right and rendered the order of the magistrate unlawful. In those circumstances it was argued